

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Conjunction LLC

Docket No. ER03-452-000

ORDER APPROVING PROPOSAL SUBJECT TO CONDITIONS,
AND GRANTING, IN PART, AND DENYING, IN PART, REQUEST
FOR WAIVERS AND BLANKET APPROVALS

(Issued May 21, 2003)

1. In this order, the Commission approves Conjunction LLC's (Conjunction) application for authority to sell transmission rights at negotiated rates, subject to conditions. The order benefits customers by allowing for negotiated rates for transmission services while ensuring that market power issues are adequately addressed.

Background

2. On January 27, 2003, Conjunction filed an application for authority to sell transmission rights at negotiated rates for the Empire Connection (EC), a yet-to-be-formed subsidiary. The EC Project is a merchant transmission project that will provide for the transmission of 2,000 MW from upstate New York to New York City (NYC) using existing railroad rights-of way.¹ The EC Project will consist of AC to DC and DC to AC convertor stations plus overhead and underground DC cable. Conjunction states that the EC Project will provide 145 miles of point-to-point firm transmission service from Niagara Mohawk Power Corporation's (Niagara Mohawk) New Scotland substation south of Albany to interconnections with Consolidated Edison Company of New York Inc. (Consolidated Edison) in either the Bronx or Manhattan. Scheduling and operations of the EC Project will be provided by the New York Independent System Operator, Inc. (NYISO), or its successor.²

Notices and Responsive Pleadings

¹EC will use the rights-of-way of CSX Transportation and Metro North Railroad.

²Conjunction states that it has commenced discussion with NYISO concerning the transfer of scheduling and operational control from EC to NYISO.

3. Notice of the filing was published in the Federal Register,³ with comments, protests, and interventions due on or before February 18, 2003. KeySpan-Ravenswood, LLC, New York Power Authority, TransÉnergie U.S. Ltd., and NYISO filed timely motions to intervene. National Grid USA (National Grid) filed a motion to intervene and comments in support of the proposal. National Grid suggests that the outcome of the proceeding be conditioned to the outcome of the pending Standard Market Design (SMD)⁴ and interconnection rulemakings.⁵ On March 14, 2003, the City of New York filed a motion to leave out-of-time.

4. In response, on March 5, 2003, Conjunction filed an answer to National Grid's comments.

Discussion

A. Procedural

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene and the notice of intervention serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁶ given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant the City of New York's untimely, unopposed motion to intervene.

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁷ prohibits answers to protests unless otherwise permitted by the decisional authority. We will not

³68 FR 6139 (2003).

⁴See Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 FR 55452 (Aug. 29, 2002), FERC Stats. & Regs. ¶ 32,563 (2002) (SMD NOPR).

⁵See Notice of Proposed Rulemaking, Standardization of Generator Interconnection Agreements and Procedures, FERC Stats. & Regs. ¶ 32,560 (2002).

⁶18 C.F.R. § 385.214(d) (2002).

⁷18 C.F.R. § 385.213(a)(2) (2002).

accept Conjunction's answer as it does not provide additional information that assists us in the decision-making process.

B. The Proposal

7. Conjunction proposes an innovative merchant transmission project which is designed to bring power into congested areas of the Northeastern United States, especially New York City. The EC Project, when operational, will significantly reduce the need for price mitigation in NYC. In crafting the EC Project, Conjunction addressed the ten criteria established in NUCSO to evaluate merchant transmission projects.⁸ The Commission will address each of the criteria below. In addition, Conjunction discusses some of the problems other merchant transmission projects have experienced and states that it has designed its proposal to avoid such problems. Conjunction, on behalf of EC, has committed to abide by all the requirements established in our previous orders on merchant transmission projects.

1. Assumption of Market Risk

8. The first criterion is that the merchant transmission facility should assume full market risk. The EC Project satisfies this criterion. Conjunction notes that the costs of the EC Project will be recovered only from customers purchasing transmission rights for the EC Project. Conjunction's proposed accounting policy will ensure that neither Conjunction nor any future affiliates it may have, will subsidize the EC Project. Under this accounting policy, EC will maintain its own books in accordance with Part 101 of the Commission regulations, and will make the books available for Commission inspection pursuant to Part 41 of the Commission's regulations.⁹ In addition, EC will file financial statements and reports in accordance with Part 141 of the Commission's Regulations.¹⁰ Finally, Conjunction states that users of adjacent grids who do not hold transmission rights to the EC Project will not be required to contribute to the costs of the EC Project through mandatory grid use or system benefits charges.

2. Open-Access Transmission Tariff

⁸Northeast Utilities Service Company, 97 FERC ¶ 61,026 (2001) (NUSCO), slip op. at 9-10

⁹18 C.F.R. Parts 101 and 41 (2001).

¹⁰18 C.F.R. Part 141 (2001).

9. The second criterion is that service should be provided under the open-access transmission tariff (OATT) of the ISO or RTO that operates the merchant transmission facilities, and that control of the facilities should be given to that ISO or RTO. Conjunction states that EC will join the NYISO, or its successor, as a transmission owner. Conjunction further states that it will transfer scheduling and operational control over the EC Project to the NYISO. Consistent with precedent for other merchant transmission projects, the Commission will require that service on the EC Project be provided under the terms and conditions of the NYISO, or its successor.¹¹

3. Secondary Transmission Rights

10. The third criterion is that the merchant transmission facility should create tradable firm secondary transmission rights and these rights should be posted on Open Access Same-Time Information System (OASIS). Conjunction's proposal satisfies this criterion. Specifically, Conjunction states that EC will transfer scheduling and operational control over the EC Project to the NYISO. It explains that a holder of transmission rights to the EC Project will be able to post its rights on the NYISO OASIS and sell its rights under the provisions of the NYISO OATT. Conjunction further explains that the holder of the transmission rights will receive the revenues associated with the sale of its transmission rights in the secondary market. Conjunction also states that EC will comply with all rules established in the Commission's upcoming rulemaking concerning reassignment of transmission rights.¹²

11. Conjunction also notes that if a holder of transmission rights does not schedule service over the EC Project, EC will post any unscheduled transmission capacity on the NYISO OASIS and make it available under the NYISO OATT. The holder of the transmission rights will receive the revenues associated with the sale of unscheduled transmission capacity. Conjunction believes that this structure will ensure that a holder of transmission rights will have fully tradable, firm secondary transmission rights to the EC Project, and will have no incentive to withhold capacity from the market.

4. Open Season

12. The Commission stated that an open-season process should be employed to initially allocate transmission rights and the parameters of the open season should be non-

¹¹See, e.g., Northeast Utilities Service Company, 97 FERC ¶ 61,026 (2001) (NUSCO-II).

¹²Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Docket No. RM01-12-000 (2001).

discriminatory, fair and transparent. Conjunction states that EC will schedule four open seasons within the calendar year beginning May 1, 2003. In each of the open seasons, bidders will be permitted to submit bids for a pre-determined portion of transmission rights to the EC Project, for terms of one month to 20 years, subject to minimum capacity, term and price conditions. Conjunction states that each open season is being developed to allow the market sufficient time to assess the benefits and risks of the project and to allow shippers time to respond to the value assigned the transmission capacity by other market participants.

13. Conjunction states that bids will be ranked on a NPV basis as established by an independent auditor. However, EC will give preference to bids that seek to maximize throughput, operating efficiency, safety and reliability and creditworthiness to finance development. Further, EC will give preference to the bid or combination of bids that provide the maximum contractual revenue. EC will engage the services of a nationally recognized independent auditor to review and evaluate bid responses. Its independent review will conclude with a report on the methodology to evaluate the bids, and EC's basis for the selection of the winning bids. The report of the independent auditor will also include an opinion and comment on the openness and fairness of the entire open-season process.

14. Conjunction states that it is proposing the multi-stage open-season process because other merchant transmission projects "have yet to meet success" with their proposed merchant transmission projects. Conjunction states that its research indicates that an important cause of project delays or failure is the inability to secure shipping contracts sufficient to satisfy investors that their capital will not be exposed to undue risks. The research further indicates that shippers are reluctant to commit to long-term obligations for transmission service given market uncertainties, long lead time and developmental risks. Conjunction also notes that bidders have tended to impose extensive conditions on their bids so as to apportion risk. On the other hand, Conjunction notes that investors look to the strength and length of the underlying transmission contracts in making decisions about whether to fund a project.

15. Conjunction states that its multi-stage process is designed to help deal with the obstacles experienced by other merchant transmission projects without the need to engage in bilateral negotiated sales of transmission capacity. Conjunction believes that its approach will enhance the likelihood that EC will obtain firm transmission agreements, which investors can look at for assurance in making their decisions to fund the EC Project to completion. Further, Conjunction believes that the multi-stage approach enhances the likelihood that a greater number of bidders will participate in the open seasons, thereby increasing competitive interest and pricing transparency.

16. The Commission finds that Conjunction's proposed open-season process is transparent, non-discriminatory and fair. Accordingly, the open-season criterion is satisfied.

5. Report on Open Season

17. The fifth criterion is that the results of the open season be posted on OASIS and filed in a report to the Commission. Conjunction states that EC will post the results of each open season on the NYISO's OASIS and file a report on the result of the open season with the Commission. Conjunction states that the report will include the identity of the parties that purchased transmission rights, the amount and term of the capacity reserved, and the prices established. The report will also indicate how many parties requested capacity but did not receive it, the amount of the capacity requested, the reason they were not awarded transmission rights. In addition, as part of the report, EC will release an independent auditor's report on the open-season process. Conjunction's proposal satisfies the fifth criterion.

6. Affiliate Concerns

18. The sixth criterion is that affiliate concerns be adequately addressed. Conjunction's proposal satisfies this concern. Conjunction is a Delaware Limited Liability Corporation whose primary business is the development of independent transmission projects. Conjunction states that although it currently has no public utility affiliates, it will inform the Commission if and when any public utility obtains an equity interest in Conjunction or EC. Conjunction also states that EC will be a special purpose entity formed exclusively to design, finance, construct, maintain and own the EC Project. EC will be comprised of direct equity investors, which Conjunction will retain a minority interest. To recover their investment, EC's investors will rely solely on the sale of transmission rights to the EC Project.

19. Conjunction states that no EC affiliates will be permitted to participate in an open season for primary transmission rights. In addition, EC will comply with all data requests from the NYISO market monitor. Further, none of the transmission systems to which the EC Project will be connected are owned by affiliates of EC. Finally, EC will comply with all of the Commission's applicable reporting requirements.

7. Access to Essential Facilities

20. The seventh criterion is that the merchant transmission facility not preclude access to essential facilities by competitors. Conjunction notes that the EC Project will be connected to the transmission systems of Niagara Mohawk and Consolidated Edison. As

such, it will not be connected to any facilities owned or controlled by any of its affiliates. Conjunction also notes that the EC Project will be subject to the transmission planning and interconnection procedures applicable in New York and currently administered by the NYISO. Finally, Conjunction contends that its proposal does not raise any issues concerning access to essential facilities or the use of rights-of-way.

21. As the Commission noted in NUSCO, the use of rights-of-way provides a means for a facility to preclude access to essential facilities.¹³ This could happen when, for example, eminent domain is used to acquire the right-of-way. In this case, however, by acquiring railroad rights-of-way, Conjunction has avoided the need to use eminent domain. The criterion on access to essential facilities is therefore satisfied.

8. Market Monitoring

22. The Commission states that merchant transmission facilities should be subject to market monitoring for market power abuse, and all data requests for an authorized market monitor should be answered. Conjunction notes that as a member of the NYISO, EC will be subject to and required to comply with data requests from the NYISO market monitoring unit, a Commission-authorized market-monitoring entity. Thus, this criterion is satisfied.

¹³NUSCO, slip op at 9.

9. Reliability Requirements

23. The ninth criterion is that physical energy flows on merchant transmission facilities should be coordinated with, and subject to, the reliability requirements of the relevant ISO or RTOs. Conjunction notes that this criterion will be satisfied by the fact that EC will join the NYISO and transfer scheduling and operational control over the EC Project to the NYISO. Since transmission service over the EC Project will be provided under the NYISO OATT, and the NYISO will have the responsibility to ensure that its reliability requirements are met for scheduling and operational purposes, this criterion is satisfied.

10. Pre-Existing Property Rights

24. The last criterion is that merchant transmission facilities should not impair pre-existing property rights to use the transmission grid or inter-connected RTOs or utilities. Conjunction's proposal satisfies this criterion. First, rights for transmission service are for point-to-point service, from one end of the EC Project to the other. The transmission rights are limited and do not extend beyond the interconnections with Niagara Mohawk and Consolidated Edison. Second, the EC Project will use direct current technology, which allows for fully controllable power transfers. Finally, since the NYISO will schedule and operate the EC Project, the rights of customers on the existing transmission grids are fully protected.

C. Requests for Waivers and Blanket Approvals

25. Conjunction requests, on behalf of EC, waiver of the full reporting requirements of Subparts B and C of Part 35 of the Regulations, except for Sections 35.13(a), 35.13(b), 35.15 and 35.16. Consistent with our rulings in other merchant transmission proceedings,¹⁴ we will grant the request for waiver of the regulations pertaining to cost-based rate data because EC will provide service at non-cost-based, negotiated rates.¹⁵

26. Conjunction also requests on behalf of EC (1) waiver of Part 45 of the regulations regarding interlocking directorates, with filing of an abbreviated statement under Part 46 identifying jurisdictional interlocks, and (2) blanket authorization for issuances of securities or assumptions of liabilities pursuant to Section 204 of the Federal Power Act

¹⁴See, e.g., TransÉnergie U.S. Ltd., 98 FERC ¶ 61,144 (2002) (TransÉnergie Harbor Cable).

¹⁵See, e.g., Ameren Energy Generating Co., 93 FERC ¶ 61,024 (2000).

(FPA),¹⁶ and Part 34 of the Commission's Regulations.¹⁷ Conjunction contends that waiver of Part 45 and blanket authorization under Section 204 are warranted for a number of reasons. First, EC will be a very small organization, with only a few officers and employees. Second, the EC Project will be the only jurisdictional asset that EC will own. Finally, EC will not have operational control of the EC Project. Thus, Conjunction contends that the burdens associated with compliance with Part 45 and Section 204 far outweigh the benefits.

27. The Commission denies Conjunction's requests for waiver and blanket approval concerning interlocks and issuance of securities and assumption of liabilities because: (1) compliance with these requirements is required by the FPA and our regulations; (2) Conjunction has not made a sufficient affirmative showing that exceptions to those statutory requirements and regulations are warranted; and (3) while the Commission has traditionally waived non-statutory regulatory requirements in the past for certain entities, such as power sellers with market-based rates, it has not done so for transmission providers, and such denial is therefore consistent with Commission precedent.¹⁸

D. Coordination with SMD and Interconnection Rulemakings

28. National Grid suggests that the outcome of the EC Project should be conditioned to the outcome of the pending SMD and interconnection rulemakings. National Grid raises a valid concern. As noted in NEPOOL, issues relating to the nascent merchant transmission projects are intertwined with issues being explored in on-going rulemakings. In that proceeding, we invited parties to comment on the obligation of merchant transmission providers to build under SMD.¹⁹ Our intent in authorizing negotiated rates for merchant transmission projects has been to encourage innovative solutions to energy infrastructure needs and to help secure financing for such projects. However, one of the regulatory risks for any project, especially novel ones such as merchant transmission projects. Indeed, in NEPOOL, the Commission noted that NEPOOL's tariff would be subject to change

¹⁶16 U.S.C. § 204 (1994).

¹⁷18 C.F.R. Part 34 (2002).

¹⁸See, e.g., TransEnergie Harbor Cable at slip op. at 8.

¹⁹Notice Requesting Comments on Merchant Transmission Providers' Obligation to Build, Docket No. RM01-12-000.

pursuant to FPA Section 206 if the Commission's policy changes in the future.²⁰ The same hold true for the OATT tariff of NYISO or its successor.

E. Conditions on the Commission's Approval

29. Consistent with our prior rulings concerning merchant transmission proposals, and Conjunction's commitments, and to assist EC in securing financing, the authorizations and waivers granted above are subject to the following conditions:²¹

(1) Service on the EC Project shall be provided under the terms and conditions of the NYISO OATT or the OATT of the successor entity to the NYISO .

(2) EC shall post the results of each of its open seasons on the appropriate OASIS and shall file a report within 30 days after the close of each open season. The reports shall include the identity of the parties that purchase capacity, the amount and term of the reserved capacity as well as the prices established under open season. The report should also indicate how many parties requested capacity but did not receive it, the amount of capacity requested, and the reason they were not awarded firm transmission rights.

(3) EC shall join or participate in the RTO containing the geographic areas of the proposed facilities and it must place operational control of the facilities under the RTO.

(4) EC shall comply with all data requests it receives from any market monitoring entity we have authorized.

(5) EC shall comply with Part 37 of the Commission's regulations,²² including standards of conduct.

(6) EC shall file the same type of quarterly reports of its transactions as required of power marketers.

²⁰NEPOOL, 100 FERC ¶ 61,259 at 61,927.

²¹TransÉnergie HCC; TransÉnergie LEL; NUSCO; and TransÉnergie.

²²18 C.F.R. Part 37 (2001).

(7) EC shall promptly inform the Commission of any changes that would reflect a departure from the characteristics that the Commission has relied upon in approving the EC Project.

The Commission orders:

(A) The Commission hereby authorizes Conjunction's proposal for the EC merchant transmission project, subject to the conditions set out in the body of this order.

(B) Conjunction's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of Sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted, as discussed in the body of this order.

(C) Conjunction's requests for (1) waiver for EC of Part 45 of the regulations and (2) blanket authorization for issuances of securities or assumptions of liabilities are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.